APPEAL NO. 172534
FILED DECEMBER 19, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on October 4, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to chronic headaches, cervical disc bulges/protrusions at C4-5, C5-6, and C6-7, cervical radiculopathy, lumbar disc protrusions at L5-S1, lumbar radiculopathy, and left wrist tenosynovitis involving the extensor carpi radialis and brevis tendon; (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. B) on October 26, 2015, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (3) the appellant (claimant) reached MMI on May 6, 2015; and (4) the claimant's IR is zero percent. The claimant appealed, disputing the ALJ's determinations of extent of injury, finality, MMI, and IR. The claimant contends that the evidence established the compensable injury extends to the disputed conditions and she has not reached MMI. Additionally, the claimant contends that she never received the first certification of MMI and assigned IR from Dr. B. The respondent (carrier) responded, urging affirmance of the disputed extent of injury, finality, MMI, and IR determinations.

DECISION

Affirmed as reformed.

The parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury and the accepted compensable injury is a left wrist sprain/strain, cervical sprain/strain, and lumbar sprain/strain. The claimant testified that she was injured when she fell while mopping.

EXTENT OF INJURY

The ALJ's determination that the compensable injury does not extend to chronic headaches, cervical disc bulges/protrusions at C4-5, C5-6, and C6-7, cervical radiculopathy, lumbar disc protrusions at L5-S1, lumbar radiculopathy, and left wrist tenosynovitis involving the extensor carpi radialis and brevis tendon is supported by sufficient evidence and is affirmed.

FINALITY

Section 408.123(e) provides that except as otherwise provided by this section, an employee's first valid certification of MMI and the first valid assignment of an IR is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. Rule 130.12(b) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means: that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both. The ALJ found that no exceptions to 90-day finality per Section 408.123(f) apply. That finding is supported by sufficient evidence.

The ALJ found that Dr. B's MMI and IR certification was provided to the claimant by verifiable means on October 28, 2016. In evidence is a copy of an e-mail dated October 28, 2015, to the claimant that states the designated doctor's examination report is attached. The claimant acknowledged her e-mail address was the one shown on the e-mail, but she testified that she never received the report through e-mail.

In Appeals Panel Decision (APD) 042163-s, decided October 21, 2004, the Appeals Panel discussed whether the deemed receipt provision of Rule 102.4 was applicable and what is meant by "verifiable means." APD 041985-s, decided September 28, 2004, and APD 042163-s, both reference the preamble to Rule 130.12. The preamble provides that the 90-day period "begins when that party receives verifiable written notice of the MMI/IR certification."

The preamble goes on to state:

> Written notice is verifiable when it is provided from any source in a manner that reasonably confirms delivery to the party. This may include acknowledged receipt by the injured employee or insurance carrier, a statement of personal delivery, confirmed delivery by e-mail, confirmed delivery by facsimile [fax], or some other confirmed delivery to the home or business address. The goal of this requirement is not to regulate how a system participant makes delivery of a report or other information to another system participant, but to ensure that the system participant filing the report or providing the information has verifiable proof that it was delivered. 29 Tex Reg 2331, March 5, 2004.

The carrier presented a copy of the e-mail that indicates the report was sent; however, there was no evidence of delivery to the claimant. Simply verifying a correct e-mail address does not establish that the report from the designated doctor was delivered. Similarly, simply mailing the certification to the correct mailing address

without evidence of delivery or sending the certification by fax to a correct fax number without verification of delivery does not establish delivery by verifiable means. Consequently, the ALJ's finding that Dr. B's MMI and IR certification was provided to the claimant by verifiable means on October 28, 2016, is in error and is stricken. We note that the finding contained in Finding of Fact No. 7 that is being stricken referenced 2016 rather than 2015.

The preamble further stated that a party may not prevent verifiable delivery and specifically provided that a party who refuses to take personal delivery or certified mail has still been given verifiable written notice. When or if the notice was provided/delivered to the claimant presented a question of fact for the ALJ to resolve. APD 042163-s, *supra*. In his discussion of the evidence, the ALJ noted that alternatively, the evidence also shows the report was mailed to the claimant by certified mail return receipt requested on November 4, 2015, and was returned to the carrier on November 24, 2015, as being undeliverable as of November 6, 2015. The ALJ further noted that the claimant testified it was sent to an incorrect address but also testified she failed to let either the carrier or the Texas Department of Insurance, Division of Workers' Compensation (Division) know about the change of address. In evidence is a Dispute Resolution Information System (DRIS) note dated March 31, 2017, that states, in part, that the claimant said she never received the certification by certified mail and never signed the green card. The DRIS note reflects that the claimant notified the Office of Injured Employee Counsel that she has moved and advised her treating doctor but did not advise the carrier. Rule 102.4(a) provides, in part, that all written communications to a claimant shall be sent to the most recent address or fax number supplied by the claimant. The ALJ was persuaded that because of her failure to notify either the Division or the carrier of her change of address, the claimant could not prevent verifiable delivery under the facts of this case.

The ALJ specifically found that the claimant filed a Request to Schedule, Reschedule or Cancel a Benefit Review Conference (BRC) (DWC-45) to dispute Dr. B's certification with the Division on April 27, 2017. This finding is supported by sufficient evidence. Using either the November 24, 2015, date of returned mail or the November 6, 2015, undeliverable date, the claimant did not dispute the certification within 90 days of delivery of written notice through verifiable means. Consequently, we affirm the ALJ's determination that the first certification of MMI and assigned IR from Dr. B on October 26, 2015, became final under Section 408.123 and Rule 130.12.

MMI/IR

The ALJ's determination that the claimant reached MMI on May 6, 2015, is supported by sufficient evidence and is affirmed.

The ALJ's determination that the claimant's IR is zero percent is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to chronic headaches, cervical disc bulges/protrusions at C4-5, C5-6, and C6-7, cervical radiculopathy, lumbar disc protrusions at L5-S1, lumbar radiculopathy, and left wrist tenosynovitis involving the extensor carpi radialis and brevis tendon.

We affirm as reformed the ALJ's determination that the first certification of MMI and assigned IR from Dr. B on October 26, 2015, became final under Section 408.123 and Rule 130.12.

We affirm the ALJ's determination that the claimant reached MMI on May 6, 2015.

We affirm the ALJ's determination that the claimant's IR is zero percent.

The true corporate name of the insurance carrier is **ARCH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201.

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge